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89-1789

CASE NO. _____

IN THE SUPREME COURT OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1989

DAVID ZETUNE..... Petitioner

vs.

ELISA ADAMI..... Respondent

PETITION FOR A WRIT OF CERTIORI

TO THE COURT OF APPEALS FOR THE

FIFTH SUPREME JUDICIAL DISTRICT

AT DALLAS, TEXAS

PETITION FOR WRIT OF CERTIORI

BY: DAVID ZETUNE, P.C.

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Q U E S T I O N S:

1.- Can the Supreme Court of Texas affirm a judgment dissolving a Jewish Marriage?, that is, a Jewish Religious Marriage totally distinguishable and distinct from the Civil Marriage ?

2.- Can a Court assume jurisdiction over the subject matter of a Jewish Marriage, without being in violation of rights protected by the First Amendment to the U.S. Constitution ?

(NOTE: The parties in the instant case, were married in Mexico; first, under the Civil Law, on April 5, 1975; and second, under the Jewish Law, on May 18, 1975).

L I S T O F P A R T I E S

Petitioner

DAVID ZETUNE

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Respondent:

ELISA AGAMI JAFIF

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S T A T E M E N T O F

J U R I S D I C T I O N

This Honorable forum, has jurisdiction under U. S. C. § 1257, that is, under certain circumstances, the United States Supreme Court may review final judgments of the highest court in a state in wich a decision could be had, when the judgment turns on a substantial federal question.

The judgment sought to be reviewed, is a denial of the Motion for rehearing for Application for Writ of Error, rendered the last February 7, 1990, by the Supreme Court of Texas. (Without opinion).

CONSTITUTIONAL PROVISIONS

First Amendment to the U.S. Constitution:

The First Amendment prohibits courts from exercising jurisdiction over purely ecclesiastical matters. In short, the establishment clause was intended to erect a wall of separation betwen Church and State.

Article 1 § 6 of the Texas Constitution:

Parallel to the First Amendment above, the Texas Constitution states in its Art. 1 § 6: "... No human authority ought, in any case whatever, to control or interfere with the right of conscience in matters of religion. "

STATEMENT OF THE CASE AND ARGUMENTS

Note: (Petitioner has requested the clerk of the Court of Appels, Fifth District of Texas at Dallas to certify the record for its transmission to this court); [Tr. stands for Transcript, followed by the page number; Supp. Tr. stands for Supplemental Transcript; S.F. stands for Statement of Facts].

This case involves a non fault divorce action betwen conservative members of the Jewish faith who had two separate and distinct marriages in Mexico City. Both are Mexican nationals, who resided temporarely in Dallas, Texas.

Elisa Agami, on January 21, 1987, filed her " Original Petition for Divorce" [Tr. 10], so invoking the jurisdiction of the 254th. Judicial District Court of Dallas County, Texas.

In her pleadings, Mrs. Elisa Agami stated in [Tr. 10 at V]: " Petitioner and Respondent were married on or about May 18, 1975," (this being the date of the Jewish Marriage). Further, in her Prayer states [Tr. 16]: Petitioner prays ... that the Court grant a divorce and such other relief requested in this petition.

It is uncontroverted that the parties had two marriages, from Mrs.Agami's testimony [Supp. Tr. 79 - first para.]: " We decided to get married on May 18, 1975 in the Synagoge, and on April 5, 1975, Legally".

Also fom this your petitionr's testimony [Supp. Tr. 95 at 1]: " We married under the Civil Law on 4/5/75, and under the Religious Law on 5/18/75 ".

The court in its judgment, [Tr. 61 lines 2 - 4], states: IT IS ORDERED AND DECREED that ELISA AGAMI JAFIF ZETUNE, Petitioner and DAVID ZETUNE MOLJO, Respondent. are divorced and that the marriage between them is dissolved. This being ambiguos as the testimony shows that there were two different and separate marriages.

The court had to address the May 18, 1975 marriage (the Jewish one) because that is the one pleaded [Tr. 10 at V]. It is a general rule that a judgment must conform to the pleadings.

As a confirmation that the court refered to the Jewish Marriage, in its Findings of Fact and Conclusions of Law [Tr. 42] states: " 2.- ELISA AGAMI JAFIF-ZETUNE, Petitioner, and DAVID ZETUNE MOLJO, were married on May 18, 1975 ".

There is no question that the court could have had jurisdiction over the Civil Marriage, if its jurisdiction had been properly invoked by the pleadinings, but the evidence shows that this is not the case. " It is well established that a state has the right to alter the marital status of a domiciliary within its own borders ". See Williams v. North Carolina, 317 U.S. 287, 298 (1942).

This your Petitioner alerted the court to no avail, prior to the entry of its judg-

ment on the Motion for New Trial [Tr. 33] where on [Tr. 40] quotes: " In handling divorces an attorney should be aware that members of the Jewish faith are required to obtain a religious divorce in order to remarry in good conscience or to marry any religious person of their faith. Failure to secure a religious divorce makes a second marriage adulterous and absolutely void, and the children are considered bastards" (From: Jewish Divorce and the Civil Law, 12 DePLR 295, 305 (1963)).

This your Petitioner asserts that a trial court has no jurisdiction over the subject matter of the separate and distinct Jewish Marriage, as it is an interference with rights protected by the First Amendment to the U. S. Constitution.

A judgment of a court without active jurisdiction over the person or subject matter is void and of no effect, and may be attacked anywhere and at any time. See Van Fossen v. State, 37 Ohio St 317, 41 Am Rep 507, State v. Westmoreland 76 S.C. 145, 56 S.E. 673, 8 L.R.A.N.S. 842.

From : Cook v. Moffat & Curtis, (1847) 46 U.S. 295, 12 L Ed. 159: Constitution of the United States is supreme law of the land, and binds every forum, wether it derives its authority from state or from United States.

FromMichaelson ex rel. Lewis v. Both D.C. R.I. 437 F.Supp. 439: Jewish citizens had right to be free to conform conduct of their lives to laws of their religion.

CONCLUSION AND PRAYER FOR RELIEF

David Zetune, your Petitioner, prays that this Honorable Supreme Court finds that the Texas Supreme Court erred by affirming the judgment entered by the Trial Court without jurisdiction over the subject matter of the Jewish marriage of the parties.

David Zetune prays that this application for writ of certiori be granted.

Respectfully submitted,

D Zetune

David Zetune Moljo, Pro Se

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

NO. 05-88-00857-CV

DAVID ZETUNE
APPELLANT,

V.

ELISA AGAMI
JAFIF-ZETUNE,

APPELLEE

FROM A DISTRICT
COURT OF
DALLAS COUNTY,
TEXAS

BEFORE JUSTICES WHITHAM, THOMAS AND BURNETT
OPINION BY JUSTICE THOMAS
JULY 7, 1989

Appellant, David Zetune (Husband), acting pro se, brings this appeal as a result of a contested divorce action joined with a suit affecting the parent-child relationship. In five points of error, Husband complains generally of the granting of the divorce itself, the terms and conditions of his visitation with the children, the amount of the child support and the denial of his motion for

continuance. For the reasons given below, we affirm the trial court's judgment.

FACTUAL BACKGROUND

Husband and Wife are Mexican nationals who participated in a Mexican civil ceremony on April 5, 1975, and were also married in a Jewish religious ceremony on May 18, 1975. They resided in Mexico City until 1982 when the family moved to Dallas, Texas, because of the failing Mexican economy. As a result of difficulties in securing work visas, the family exhausted all savings and had to borrow large sums of money from various family members.

After almost twelve years of marriage, appellee, Elisa Agami Jafif-Zetune (Wife), filed for a divorce. The pleadings reflect that Wife sought a divorce on the basis that the marriage had become insupportable and requested

that she be appointed the managing conversator (sic) of the three minor children. Wife further asked that the court order husband to pay child support. Husband filed a counterclaim seeking joint managing conservatorship or, in the alternative, requested the court to appoint him as the sole managing conservator and to order Wife to pay child support.

The parties divided their personal community property and stipulated to the trial court that each would receive the personal property in his or her possession. The parties further entered into an agreement concerning the division of the community debts. After a lengthy non-jury trial, a decree of divorce was entered dissolving the marriage. Wife was named managing conservator and Husband was appointed

possessory conservator with specific times of visitation. Husband was also ordered to pay child support.

DISSOLUTION OF THE MARRIAGE

In the first point of error, Husband contends that the trial court lacked jurisdiction to enter the divorce decree because it dissolved the religious marriage rather than the civil marriage. Husband's argument is based upon the fact that the date of marriage asserted in Wife's petition is that of the Jewish ceremony.

It is uncontroverted that the parties were married. Further, there is no question that the parties had continuously resided in Dallas County since 1982. Therefore, Wife met the residency qualifications set out in section 3.21 of the Texas Family Code.[1]

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[1] A divorce may be maintained if at the

It is well established that a state has the right to alter the marital status of a domiciliary within its own borders. See Williams v. North Carolina, 317 U.S. 287, 298 (1942). The trial court was not dissolving a ceremony, but rather was dissolving the legal marital status between the parties. There is nothing in the record to demonstrate that the trial court was attempting to dissolve or interefere (sic) with the religious union of these parties.

Texas makes no distinction between civil and religious marriages; therefore, it is irrelevant that the trial court found that the parties entered into a Jewish ceremony on a particular date. The

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time the suit is filed the petitioner or respondent has been a domiciliary of this state for the preceding six-month period and a resident of the county in which the suit is filed for the preceding ninety-day period. TEX. FAM. CODE ANN. § 3.21 (Vernon 1989).

marital relationship was dissolved by the trial court, not a particular ceremony. The first point is overruled.

VISITATION RIGHTS

In the second and third points of error, Husband alleges that the terms and conditions of visitation set out in the divorce decree violate his constitutional rights of freedom of religion. The essence of Husband's argument is that by virtue of the times he is allowed visitation, he is prohibited from participating with his children in certain traditional Jewish celebrations.

The best interest of the children shall always be the primary consideration of the court in determining questions relating to possession of and access to the children. See TEX. FAM. CODE ANN. §14.07 (a) (Vernon 1989). In determining the best interests of the children, the

court was required to consider the circumstances of the parents. See TEX. FAM. CODE ANN. § 14.07 (b). A trial court's judgment in determining best interests will be reversed only when it appears from the record as a whole that the court has abused its discretion. Vellek v. Vellek, 709 S.W.2d 760, 762 (Tex. App. -- San Antonio 1986, no writ); Saums v. Saums, 610 S.W.2d 242, 244 (Tex. Civ. App. -- El Paso 1980, writ dism'd). We do not find an abuse of discretion by the trial court.

Husband's constitutional arguments are without merit. The free exercise clause of the first amendment prohibits compulsion by law of the acceptance of any creed or the particular practice of any form of worship. See Hobbie v. Unemployment Appeals Comm'n of Fla., 107 S.Ct. 1046, 1048-49 (1987); Cantwell v.

Connecticut, 310 U.S. 296, 303 (1939); U.S. CONST. amend I. The trial court's decree does not prevent Husband from practicing his religion, it does not compel him to practice a religion, nor does it preclude him from sharing his religion with his children.

The record is replete with testimony concerning the parties' dedication and devotion to their religion. The children are in a private religious school and both parties have been actively involved in their activities. Recognizing Husband's contribution in this area, the decree of divorce provides that Wife has the right to determine the religious training of the children only after consultation with Husband. The Jewish religious holidays are equally alternated between Husband and Wife, as well as other extended periods of possession. In

addition, Husband has possession of the children the first and third weekends of each month from Saturday evening until the following Monday and from Saturday evening until Sunday evening on the fourth weekend of each month. As additional visitation, Husband was awarded possession each Tuesday evening with the right to overnight visitation if the children so desire.

During these periods of possession, Husband has the right to instruct his children and familiarize them with Jewish religious beliefs and practices. Therefore, we cannot agree that Husband has been deprived of fundamental religious rights and duties protected by the First Amendment. The second and third points are overruled.

CHILD SUPPORT

In the fourth point of error, Husband

argues that the trial court ordered an excessive amount of child support. The trial in this matter was heard during the months of November and December 1987 at which time Husband's income was $50,000 per year. Following the trial of this case, Husband encourtered (sic) some financial difficulties which lowered his income. At the time of the entry of the decree, the trial court took into consideration the diminished earning and ordered child support in the amount of $600 per month for six months. Thereafter, Husband was ordered to pay $900 per month for the three children. The decree also provided for automatic reductions to specific amounts in the event that one or more of the children were no longer legally eligible to receive support. As additional child support, husband was ordered to keep and

maintain a major medical and health insurance policy on the children and to pay one-half of all uninsured health care expenses incurred on behalf of the children.

Each parent has the duty to support his or her minor children. Matter of Marriage of Miller, 600 S.W.2d 386, 389 (Tex. Civ. App.--Amarillo 1980, no writ). The trial court has broad discretion in setting child support payments, and absent a clear abuse of discretion its order will not be disturbed on appeal. Carpenter v. White, 624 S.W.2d 618, 619 (Tex. App.--Houston [14th Dis.] 1981, no writ). In examining an award of child support, we must indulge every reasonable presumption, consistent with the record, in favor of such judgment. Friedman v. Friedman 521 S.W.2d 111, 114 (Tex. Civ. App.--Houston [14th Dist.] 1975, no writ.

Based upon our review of the record on appeal, the trial court did not abuse its discretion in determining the amount of child support. In fact, the record demonstrates that the trial court set the payments in accordance with Husband's reasonable earning capacity. We overrule point four.

MOTION FOR CONTINUANCE

In the last point of error, Husband contends that the trial court erred in overruling his motion for continuance. We disagree. The granting or denial of a motion for continuance rests within the sound discretion of the trial court. Further, the trial court's denial of a motion for continuance will not be disturbed unless the record discloses a clear abuse of discretion. State v. Crank, 666 S.W.2d 91, 94 (Tex. 1984), cert. denied, 469 U.S. 833.

Husband asserts that he should have been granted a continuance because his attorneys withdrew the day of the trial. He further contends that the trial court denied him access to certain bank records. Husband had been represented by counsel until the date of the trial, November 19, 1987, at which time both of his attorneys filed motions to withdraw. At that time, Husband did not object to their withdrawal. In fact, he represented to the court that they were withdrawing at his request and with his approval. Thereafter, Husband, acting pro se, requested that the trial court postpone the trial which had been set for some three months. The trial court denied Husband's request. The case proceeded to trial on November 19, 1987, but was not completed until December 16, 1987, because of a number of recesses, some at

the request of Husband and some because of the trial court's docket. The statement of facts, consisting of 733 pages, demonstrates that Husband called witnesses on his behalf, cross-examined witnesses, subpoenaed witnesses and introduced voluminous documentary evidence.

The bank records about which Husband complains involved a checking account of Wife's father where Wife was a co-signatory. Husband contended on a number of occasions that community funds were commingled into the account. Husband offered no evidence of commingling; therefore, the trial court refused to order that the records be produced. Because Husband failed to offer any evidence of commingling, the bank records of Wife's father were not relevant to this proceeding. Evidence is relevant

only if it tends to establish the truth of a proposition to a material issue. Trailways Bus System, Inc. v. Hamauer, 660 S.W.2d 607, 610 (Tex. App.--Corpus Christi 1983, writ ref'd n.r.e.). We conclude that the trial court did not err in denying the motion for continuance nor did it err in refusing to order production of the bank records. We therefore overrule Husband's final point of error and affirm the trial court's judgment.

/s/Linda Thomas
LINDA THOMAS
JUSTICE

PUBLISH
TEX. R. APP. P. 90

88-00857.F

SUPREME COURT OF TEXAS
P.O. BOX 12248
Supreme Court building
Austin, Texas 78711
John T. Adams, Clerk

February 7, 1990

From Dallas County, Fifth District

No. C-9153

DAVID ZETUNE

vs.

ELISA AGAMI JAFIF-ZETUNE

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is overruled.

/s/
Deputy Clerk